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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 353

KOHLER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

AND

LOCAL 833, UAW–AFL–CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The first opinion of the court of appeals (Supp. J.A. 2318–2339)[1] is reported at 300 F. 2d 699. Its second opinion (Pet. 38–39) is reported at 345 F. 2d 748.

[1] "J.A." refers to the Joint Appendix printed for the use of court below in the first proceeding, and used in both proceedings. "Supp. J.A." refers to the Supplemental Joint Appendix, which was printed for the use of the court below in the later proceeding and is paginated consecutively with the Joint Appendix. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

The initial decision and order of the Board (J.A. 8–412) are reported at 128 NLRB 1062. Its supplemental decision and order (Supp. J.A. 2339–2378) are reported at 148 NLRB 1434.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1965 (Pet. 38–39). The petition for a writ of certiorari was filed on July 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, where strikers have been discharged for misconduct in connection with an unfair labor practice strike, the Board may order the strikers reinstated with back pay, if such remedy is necessary to effectuate the policies of the National Labor Relations Act.

2. Whether the court of appeals exceeded its reviewing authority in remanding the first proceeding to the National Labor Relations Board to reconsider whether a strike among the Company's employees was an unfair labor practice strike from its inception.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*), are set forth at pp. 39–40 of the petition for certiorari.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE COMPANY'S LABOR POLICY PRIOR TO THE UNION'S CERTIFICATION

In 1952, Local 833, UAW–AFL–CIO, the respondent Union, was certified by the Board as the exclusive bargaining representative of petitioner Kohler's production and maintenance employees (J.A. 129–130). For almost 20 years prior thereto, the employees had been represented by the Kohler Workers Association. Kohler instigated the formation of the KWA as a means of combating the organizational efforts of the AFL,[2] and it was in effect a "Company dominated" labor organization (Supp. J.A. 2343–2345).

In 1950, the Union began a campaign to displace the KWA as the employees' bargaining representative, but it lost a Board election to the KWA, which was aided by the Company (Supp. J.A. 2345; J.A. 884–885). In the summer of 1951, the Union continued its effort to organize the employees. The Company countered by engaging in conduct which the Board found to constitute unfair labor practices.[3] Thus, Company officials instructed supervisors to find any Union adherents in their departments and to seek out pretexts for effecting their discriminatory discharge. Company supervisors threatened to discharge or take other reprisals against Union adherents, offered bene-

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[2] The Company repulsed the AFL in 1934, in a violent struggle which involved the use of tear gas and the State militia against the strikers (Supp. J.A. 2343).

[3] See *Kohler Co.*, 108 NLRB 207, enforced in *National Labor Relations Board* v. *Kohler Co.*, 220 F. 2d 3 (C.A. 7).

fits to employees who abandoned the Union, and warned an employee that he "was under surveillance by roving guards." And the Company discharged an employee for his union activity. (Supp. J.A. 2345–2346.)

On April 4, 1952, the Union filed a representation petition with the Board covering the Company's production and maintenance employees (Supp. J.A. 2346). The KWA membership voted to affiliate with the Union. The Company, charging that this action resulted from the "double dealing" of KWA officials, began refusing to entertain grievances from KWA stewards, and withdrew other KWA privileges (Supp. J.A. 2346–2347). In addition, the Company attacked the Union as an organization that was "quick to resort to force," wanted to "create" employer-union hostility, and was a threat to "17 years of industrial peace" (Supp. J.A. 2347; J.A. 838, 1325–1336, 1339–1340, 2272–2277, 2282–2291).

Notwithstanding the Company's anti-union campaign, the Union won the election held on June 10 and 11, 1952, and was certified by the Board (Supp. J.A. 2347; 2181–2182). Immediately thereafter, the Company withdrew the last forms of assistance which the KWA had received (Supp. J.A. 2347; 2502–2503).

2. EXECUTION AND ADMINISTRATION OF THE 1953 CONTRACTS

The KWA had begun contract negotiations late in 1951, but had been unable to reach any agreement with the Company to replace the existing contract which expired on January 30, 1952 (Supp. J.A. 2347; J.A. 2263–2264). In August 1952 the Union supplanted the KWA at the bargaining table and contract talks re-

sumed (Supp. J.A. 2347; J.A. 1051). No agreement having been reached by the middle of February 1953, the employees authorized the Union to call a strike (Supp. J.A. 2347; J.A. 1050, 2208–2209). Anticipating a walkout, the Company had made plans to quarter on the premises a large "plant protection" force, comprised in part of regular supervisory personnel, which would keep an around-the-clock vigil (J.A. 1049–1051).* However, no strike occurred, because on March 1, 1953, after the intervention of government mediation and conciliation services and the issuance of the Board complaint with respect to the Company's earlier unfair labor practices (n. 3, p. 3, *supra*), the Company agreed to its first contract with an "outside" union (Supp. J.A. 2347; 2387–2437, J.A. 1050).

On May 23, 1953, pursuant to a 3-months' wage reopening clause in the contract, the Union requested a wage renegotiation (Supp. J.A. 2348; J.A. 1102). These talks also proved fruitless until the employees again voted to authorize a strike and both the Company and the Union again initiated strike preparations similar to those undertaken earlier in the year (Supp. J.A. 2348; 2510, J.A. 1048–1058, 1066–1067). On August 20 the parties executed a supple-

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*Thus, the Company brought about 300 cots into the plant, made arrangements for the delivery of special stockpiles of coal and food, erected five or six watch towers on the roofs of various Company buildings, and purchased 8 twelve-gauge shotguns with 500 rounds of ammunition and tear gas guns with 75 rounds (Supp. J.A. 2347–2348; J.A. 1049–1058, 1066–1067). The Union, for its part, had set up a soup kitchen and rest room facilities and brought in sound trucks (J.A. 13; 2208–2209).

mental agreement providing for a 3-cent wage increase. This agreement also provided for a joint committee to study and to negotiate about inequities in the wage structure. (Supp. J.A. 2349–2350; 2501–2502.)

In October 1953, the Union notified the Company that it wanted to negotiate regarding wage inequities, and requested the Company to supply it with the average incentive earnings on operations involving some 65 percent of the unit employees in order to enable the Union to formulate a proposal (Supp. J.A. 2350; J.A. 544–545, 582, 1197, 1566). Some two months later the Company supplied a small portion of this information, regarding the pottery division (Supp. J.A. 2350; 2511–2512, J.A. 582, 1359, 1567). However, it failed to supply information with respect to the enamelware division until August 1954 (10 months after the Union's initial request), notwithstanding Company Attorney Lyman Conger's representation to the Union, in February 1954, that such information was presently on his desk; and it never supplied the information pertaining to other divisions, notwithstanding the Union's repeated requests (Supp. J.A. 2350, J.A. 21–23, 150; 546–547, 568, 582–583, 591–592, 810–811, 1531–1536, 1566–1569, 1586–1588, 2102). As the Union pointed out to the Company, it was impossible for the Union to present any common-sense plan on inequities without the incentive-earnings information (Supp. J.A. 2350; J.A. 592, 1586).

Meanwhile, the incentive workers in the brass die casting department were complaining to the Union that subsequently imposed artificial limitations had

nullified the wage increase purportedly given them by the 1953 contract and its supplement (Supp. J.A. 2350, J.A. 23; 1537–1539, 1560, 1569–1570). When the Company expressed doubt as to the truth of this allegation, the Union asked for the average earnings of the incentive workers in the brass die department for the last three months of 1952 and the last three months of 1953 (Supp. J.A. 2350, J.A. 23; 1558–1559, 1569–1570, 1536–1538, 2036). The Company never supplied this information (Supp. J.A. 2350, J.A. 23; 886–887, 905, 1105–1106).

The 1953 contract provided for a grievance procedure (Supp. J.A. 2391–2398). However, Attorney Conger frequently disparaged those employees who attempted to utilize this procedure by referring to them as "malingerers and finaglers" (Supp. J.A. 2351; J.A. 1594–1595, 891–893). The Company manifested such an uncooperative attitude toward the whole grievance procedure that many employees felt it useless to submit grievances, and the Union found it difficult to persuade employees to serve as job grievance stewards (Supp. J.A. 2351; J.A. 454). Moreover, before and during the negotiations which preceded the 1954 strike (pp. 8–12, *infra*) the Company threatened reprisals against stewards because it believed that they were too active in pressing grievances, and offered a promotion to a chief steward if he would stop processing grievances (Supp. J.A. 2351, J.A. 49–50; 825–826, 833–835).

Company President Herbert Kohler testified at the Board hearing that from the time the Union came into

the plant, it had been attempting to "take the life" of the Company and to obtain "dictatorial power"; that "from the day we signed the first contract" he believed that the Union was going to call a strike as soon as it "could drench [the employees'] minds"; and that the Company's execution of the 1953 agreement did not signify any change in his hostility to the Union (Supp. J.A. 2349; J.A. 426–445). Attorney Conger, the Company's principal negotiator, expressed like views during a grievance meeting in September 1953. At that meeting, Union Representative Burkart urged Conger to "let bygones be bygones" and try to develop a mutually beneficial relationship (J.A. 455). When Burkart then likened the relationship between the parties to a marriage, Conger replied, "* * * if it is, it sure as hell was a shotgun wedding" (Supp. J.A. 2348; J.A. 455).

3. THE NEGOTIATIONS IN 1954 PRIOR TO THE STRIKE OF APRIL 5

In December 1953, both parties served notice that they desired to modify the 1953 contract, due to expire on February 28, 1954 (J.A. 15; 2030–2031). In January the parties exchanged contract proposals (J.A. 15; 2034–2035, Supp. J.A. 2438–2489). The Union sought, *inter alia,* a general wage increase and an "adjustment of all existing [wage] inequities" (J.A. 2034–2035). The Company, however, offered no wage increase or other new benefits, while proposing contract terms designed to reduce nonmonetary benefits significantly (Supp. J.A. 2352–2353, J.A. 157–158, 168–169; 530, 534, 578–579, 662). Thus, the Company's proposal deleted the provision in the 1953

contract calling for joint study and settlement of the wage inequities problem, and removed from the scope of the arbitration clause grievances involving discharges, incentive pay standards, day work pay standards, incentive rates, merit increases, and changes in working schedules (Supp. J.A. 2352–2353; 2436, 2442, 2446, 2455, 2472, 2480, 2486–2487). Moreover, during the subsequent negotiations (pp. 9–12, *infra*) the Company also insisted on excluding from the scope of the arbitration clause questions pertaining to inequitable shop rules and compliance with the contract provisions regarding job transfers and observance of seniority in effecting layoffs (J.A. 15–16; 463, 1241, Supp. J.A. 2386, 2490–2491).

Negotiating sessions began on February 2, 1954, and were held from time to time until early August 1955; at the close of the Board hearing, in April 1956, no agreement had yet been reached. Company Negotiator Conger devoted considerable time to vituperative attacks on unions in general and the Union in particular, especially when the Union sought to discuss particular contract issues (Supp. J.A. 2352; J.A. 576–577, 459–460, 892–894, 895, 908–909). Company representatives dissipated further time by issuing ultimata asserting that the Company's position was "fixed" or "final," and by insisting that the negotiations were futile and "a waste of time" (Supp. J.A. 2352; J.A. 470–471, 613–614, 648–649, 654, 791, 1401, 1407, 1548, 1574, 1590, 1592, 2071–2074). The Company resisted, on grounds of "principle," the Union's repeatedly scaled-down union-security proposals (J.A. 164–168; 670–671, 678–679, 688–689, 760–

762, 1539–1541, 1553, 1557, 1570–1571). However, when the Union pointed out that the Company had offered to sign a union-security agreement with the KWA, Company Negotiator Howe declared that he "wasn't taking a principle position," but that an organization without a union shop was "weaker" and "easier * * * to deal with" (J.A. 524, 603, 1540–1541).

On February 23 the Union proposed that the 1953 contract be extended for one month (Supp. J.A. 2353, J.A. 16; 461–462). On February 25 the Company rejected the Union's proposal, offering instead to extend the existing contract for one year without a wage increase (Supp. J.A. 2353–2354; J.A. 465, 2038–2039). On the following day the Company tendered the Union the alternative of a 3-cent wage increase, conditioned on the Union's acceptance of the Company's other outstanding demands, including the deletion of the provision for negotiations on wage inequities and the limitations on the scope of the arbitration clause (Supp. J.A. 2353–2354; J.A. 2040). Throughout the subsequent negotiations the Company insisted on the Union's acceptance of one or the other of these two "packages" (Supp. J.A. 2354; J.A. 31, 33–34, 168–169, 171–173, 176; 476–477, 508–509, 531, 544, 662, 668, 1269–1271, 1297–1298, 1399, 1582, 1589, 1846–1847, 2071–2072, 2153, 2159–2162).

On February 28 Union negotiators advised a Union meeting attended by about 2,000 employees that the "Company wasn't bargaining in any better faith to arrive at the terms of a new agreement than they had under the old agreement on grievances during the past year," and that unless the Union negotiators had the

strike weapon at their disposal, the Company would not negotiate a new contract (J.A. 480–482, 603). The membership thereupon authorized a strike vote, and rejected, with only one dissent, the Company's proposals of February 25 and 26 (J.A. 483). On March 14 the Union held another membership meeting, also attended by some 2,000 employees, at which Union officials again asserted that "the Company * * * would not bargain sincerely unless the membership approved the strike vote." The membership voted by an 88 percent majority to reject the Company's proposals and to authorize the Union's executive board to call a strike (J.A. 17; 484–485, 646).

On March 15 the Company began elaborate strike preparations. It once more erected watch towers at various points atop the Kohler buildings, and outside of these towers installed large swivel-mounted floodlights (J.A. 1063–1064). It stockpiled coal, procured a 10 to 14 day supply of food for 300 persons, and readied its cot inventory for use (J.A. 20; 1062–1063, 1066). The Union, too, renewed its strike preparations, setting up soup kitchens, rest room facilities, and sound trucks (J.A. 17).

Following an 11-day break in the discussions, the parties met again in early April (J.A. 17; 2189). The Union expressed willingness to compromise on specific major issues, but Conger replied that "as far as they were concerned there wasn't any more * * * they had made this clear on several occasions, and they were making it clear again" (J.A. 647–654). The Union accused the Company of bargaining in bad faith, without any desire to reach an agreement, in

order to force the Union to strike (J.A. 651–652). At the moment of break-off, Company negotiators remarked that they had seen the strike coming for a long time, and that if the parties had to have a showdown, "it might as well come now" (J.A. 18, 140; 475, 615–617, 652–653, 791, 1372, 1549–1550, 1575, 1592–1593). The strike began on Monday morning, April 5, 1965 (J.A. 18; 475).

4. THE PERIOD FROM APRIL 5 TO MAY 28, 1954

From April 5 to May 28, except for three days early in May, the plant was shut down. There was mass picketing by up to 2,500 pickets. Violence erupted in many instances, and the Union engaged in so-called "belly-to-back" picketing, with roving patrols, which prevented non-strikers from entering the plant. (J.A. 65–66, 242–243.) This type of picketing ceased on May 28, pursuant to an order of the Wisconsin Employment Relations Board,[5] and the parties agreed to resume negotiations as of June 1, when the plant reopened (J.A. 182–187).

5. THE BARGAINING SUBSEQUENT TO JUNE 1, 1954

On or about June 1, 1954, just as the parties were returning to the bargaining table, the Company, while purporting to maintain the terms of the expired contract, unilaterally and without notice to the Union instituted a 3-cent wage increase (effective as of April 5) (J.A. 31, 171; 419–420, 751, 753, 878, 1123–1124, 1557–1558). At no time either prior to or after this unilateral wage increase did the Company offer to execute a contract incorporating the terms and

[5] See *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266.

conditions of employment which it had thus put into effect—namely, a renewal of the old contract with a 3-cent hourly increase (Supp. J.A. 2354; J.A. 31, 33–34, 168–169, 171–173, 176; 476–477, 508–509, 531, 544, 662, 668, 1269–1271, 1297–1298, 1399, 1582, 1589, 1846–1847, 2071–2072, 2153, 2159–2162).

The parties met for a while, but the talks broke off in mid-August.[6] They were resumed in early September at the urging of Judge Murphy, a State court judge (J.A. 192; 735–756, 956–959, 2189). At one of these meetings, a federal conciliator observed that acceptance by the Union at this time of the 3-cent wage increase which Kohler had previously put into effect unilaterally "would amount to complete capitulation" (J.A. 193; 972). Company Negotiator Conger agreed, and then declared "that their offer was their best offer, and their last offer * * * that there had been a bitter strike in 1934; that it resulted in twenty years of labor peace, and that he was going to insist that this strike bring to the Company twenty years of labor peace" (J.A. 193; 972–973). Conger added,

[6] One of the topics discussed in the renewed negotiations was the disposition of temporary employees in a Shell Department which had been making munitions for the government under a contract that was about to expire. On July 1, the Company discharged the 53 Shell Department employees who were on strike, and transferred to other departments the 29 Shell Department employees who were working. In its prior discussions with the Union, the Company had never indicated that it contemplated such disparate treatment for the Shell Department employees. Later, the Company unilaterally decided to rehire the employees in the Shell Department who had been on strike, but accorded them even less seniority than that accorded new employees. (J.A. 176–179; 499–503, 584–586, 619–620, 632–634, 866–870, 1551–1552.)

"We are going to teach the Union a lesson" (J.A. 193; 972–973).

After meeting separately with Union and Company representatives, Judge Murphy indicated to the Company that all other outstanding issues could be dropped, and the strike settled, by a 7-cent or a 5-cent increase, which included the 3 cents previously granted (J.A. 194–196; 974, 982, 2227–2228). Although Conger had previously advised Judge Murphy that the door was not closed on the question of increases, he now flatly refused any further increases (J.A. 169, 193–194; 966–969, 2226–2228).

Between the end of September 1954 and August 1955, the Company and the Union met on several occasions, but these meetings were no more fruitful than before.[7] In early August 1955, the Company, unilaterally and without prior notice to the Union, put into effect a wage increase of 5 cents an hour (J.A. 46, 211–212, Supp. J.A. 2339–2340).

6. OTHER COMPANY CONDUCT DURING THE STRIKE

Beginning in April 1954, the Company retained the services of certain detective agencies, chiefly the Madson Detective Agency (J.A. 386–388; 1898–1899,

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[7] During hearings before the Senate Subcommittee on Labor and Public Welfare in June 1955, Company Attorney Howe complained that, in discussing contract terms, the Union had failed to mention the Universal Rundle Corporation, a Kohler competitor with whom the UAW–CIO had recently signed a contract "incorporat[ing] practically what we have offered the union and they have refused for a year to take" (J.A. 207–208; 2138). When Union Representative Kitzman then offered to sign the same agreement with the Company, it refused (J.A. 207–208; 2139–2141).

1911–1914, 2248–2256). The Company, through Madson, engaged in an extensive program of surveillance and anti-union espionage (J.A. 388–390; 1899–1900, 1914, 2248–2249, 2293–2317). Madson suggested to the Company the possibility of "bugging" a hotel where union representatives and Board trial counsel were lodged during the hearing in this case with a device capable of monitoring conversations anywhere in the building (J.A. 61, 64, 390–391; 1903–1905, 1907–1910, 2296–2304). Another Madson report to the Company detailed a proposal for a system of secret informants in the plant who were to report on "any labor movement, infiltration, or problem" (J.A. 61, 391; 2304–2307). The detectives also investigated the private life of a Board counsel assigned to the case (J.A. 62–63; 2292–2293, 1903–1905, 2166–2167).

In late June 1954, one of the Company's foremen attempted to persuade a highly skilled worker, Forstner, to abandon the strike by promising him various special benefits and by urging his wife to use her influence to secure her husband's return to work (J.A. 47–49, 218–219, 224–225; 922–927). During December 1954 and early January 1955 the Company evicted various strikers from their Company-owned living quarters because of their participation in the strike (J.A. 52, 233–234, Supp. J.A. 2319).

7. THE DISCHARGE OF THE STRIKERS

Although mass picketing by striking employees barred ingress to the plant from April 5 through May 28, 1954 (p. 12, *supra*), the subsequent picketing

did not have that effect. During the month of August 1954, however, a series of demonstrations occurred around the homes of various non-strikers. Only a small percentage of those present were strikers; the groups were made up mainly of neighbors, passers-by, and sympathizers with the Union. During December 1954 and January 1955, groups of pickets patrolled in front of the Company's employment office. Generally, these groups attempted to impede the entrance of job applicants into the office. (J.A. 65–66, 69–70, 242–243, 246–250.)

During the meetings with Judge Murphy in September 1954, the Company first indicated that it was going to discharge certain striking employees for misconduct. On February 18, 1955, the Union wrote the Company requesting the right to negotiate concerning the strikers whom the Company would not reinstate. On March 1, 1955, the Company notified 91 strikers that because of their strike misconduct they would not be reinstated. That same day the Company wrote the Union informing it of the action taken. At no time did the Company comply with the Union's demand to bargain over the discharges. (J.A. 204; 435, 682–686, 1298–1299, 2110, 2112–2115.)

B. THE INITIAL DECISIONS OF THE BOARD AND THE COURT OF APPEALS

In its original decision, the Board found that the Company had refused to bargain in good faith with the Union on and after June 1, 1954, in violation of Sections 8(a) (5) and (1) of the Act, by unilaterally putting wage increases into effect; by discharging the

striking Shell Department employees and transferring the non-striking employees in that department without notification to or consultation with the Union; by delaying and refusing to furnish pertinent wage information for purposes of bargaining; by refusing to negotiate with the Union with respect to the identity of employees whom the Company considered ineligible for reinstatement upon termination of the strike; and by otherwise failing to meet its statutory obligation to bargain in good faith (J.A. 23–24, 26, 28–32, 41, 43, 46, 73–74, 151–156, 179–182, 199–200, 203). The Board also found that the Company had violated Sections 8(a) (3) and (1) by discriminating against the Shell Department employees and discharging Alex Dottei (one of the strikers discharged in March 1955) because of their participation in strike activities (J.A. 40–41, 73, n. 69, 179–182). Finally, the Board found that the Company had interfered with, restrained, and coerced its employees, in violation of Section 8(a)(1), by engaging in surveillance and anti-union espionage, by evicting certain strikers from Company-owned dwellings, by seeking to discourage Union stewards from processing employee grievances, and by certain other conduct (J.A. 40–41, 42, 47–51, 52, 61, 218–219, 224–225, 232, 233–234, 392–393).

The Board (one Member dissenting) further found that, in the negotiations preceding the strike which began on April 5, 1954, there had been no generalized refusal to bargain on the Company's part (J.A. 13,

18–20, 29–30, 138–139, 144–147).[8] The Board concluded, therefore, that the strike had been caused not by unfair labor practices but by the failure of the parties to agree on a contract, but that the strike had been prolonged, and thereby converted into an unfair labor practice strike, by the violations of the Act committed by the Company on and after June 1, 1954 (J.A. 38–41, 43, 46, 62, 361, 391–392).

Since the strike had been converted into an unfair labor strike, all strikers not replaced as of June 1, 1954, were entitled upon application to be reinstated to their former positions unless they had engaged in such misconduct as would disqualify them from reinstatement. The Board found that, of the 78 strikers named in the complaint who were discharged in March 1955, all but 1 (Dottei, *supra*) had engaged in activities serious enough to disqualify them for reinstatement (J.A. 69, 73).

The Board ordered the Company to cease and desist from the unfair labor practices found; to bargain in good faith with the Union; to offer the strikers, upon application, reinstatement to their former or substantially equivalent positions (except the 77 who the Board found had been lawfully discharged for misconduct), dismissing, if necessary, any replacements hired after June 1, 1954; and to reimburse the strikers entitled to reinstatement for any lost wages (J.A. 78–83).

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[8] The Board found one instance of refusal to bargain preceding the strike, *viz*, the refusal to furnish information relating to the brass die casting department (pp. 6–7, *supra*); it concluded, however, that this refusal had been unrelated to the contract negotiations (J.A. 29).

The court of appeals (Judge Miller dissenting) held that the Board's findings of unfair labor practices were "amply supported by the record considered as a whole," and enforced the Board's order designed to remedy these practices (Supp. J.A. 2319–2320, 2330–2331).[9] However, the court remanded the case to the Board for further consideration of the Board's finding that the strike had not been caused by unfair labor practices and that 77 strikers had disqualified themselves for reinstatement (Supp. J.A. 2331).[10] The court concluded that the Board, in finding that the strike had not been an unfair labor practice strike at its inception, had "improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history in assessing its intent at the bargaining table in 1954" (Supp. J.A. 2328). The court further concluded that the Board had erred in failing to weigh the misconduct of the 77 strikers against the Company's antecedent unfair labor practices, in determining whether their misconduct was sufficient to disqualify them for reinstatement (Supp. J.A. 2320, 2322–2327).

C. THE SUPPLEMENTAL DECISIONS OF THE BOARD AND THE COURT OF APPEALS

Upon further review of the evidence with respect to the cause of the strike, the Board (one Member

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[9] The Company filed a petition for certiorari with respect to, *inter alia*, this portion of the court's decision. The Court denied this petition. 370 U.S. 911. The Company does not now challenge the propriety of the unfair labor practice findings sustained by the court of appeals.

[10] The Union had filed a petition to review challenging these findings.

dissenting) concluded that the strike had been caused by the Company's failure to bargain in good faith and therefore had been an unfair labor practice strike from its inception (Supp. J.A. 2342–2354). The Board then evaluated the misconduct of each of the 77 discharged strikers in the light of the Company's unfair labor practices. The Board (one Member dissenting) concluded that the policies of the Act would best be effectuated by the reinstatement of those employees whose misconduct was limited to participation in the mass picketing of the plant between April 5 and May 28, 1954; in the operation of the related pass system during that time; in demonstrations before the homes of nonstrikers during August 1954; and in picketing of the employment office during December 1954 and January 1955 (Supp. J.A. 2355–2359).[11] Similarly, the Board concluded that certain other misconduct, such as bumping, shoving, shouldering, and verbal harassment of nonstrikers, and the temporary detention of certain trucks and railroad cars leaving the Company's premises, was not in the circumstances so serious as to bar the reinstatement of those participating (Supp. J.A. 2359–2361). However, the Board decided to withhold reinstatement from those strikers who had either engaged in violent physical assaults on nonstrikers or threatened the families of nonstrikers (Supp. J.A. 2361–2366).

Supplementing the remedial portions of the prior order, which had been enforced by the court of ap-

[11] The Trial Examiner's account of these activities is found in the record as follows: mass picketing at J.A. 242–243; home demonstrations at J.A. 249–250; employment office picketing at J.A. 251, 255.

peals, the Board ordered the Company to offer full reinstatement not only to those strikers replaced after June 1, 1954, but also to those replaced prior to that date. In addition, the Board ordered the Company to offer full reinstatement to the 57 discharged strikers whose reinstatement the Board had determined would effectuate the policies of the Act.[12] Finally, the Board ordered the Company to make both groups of strikers whole for any loss of pay they may have suffered as a result of the Company's failure to reinstate them on and after January 26, 1962, the date of the court of appeals' first decision (Supp. J.A. 2368).

The court of appeals (Judge Miller dissenting) enforced the Board's supplemental order in full. The court stated: "The Board properly applied the principles announced in our initial decision, and its determinations are supported by substantial evidence on the record viewed as a whole" (Pet. 39).

ARGUMENT

1. The principal question presented is the validity of the *Thayer* principle, announced in Judge Magruder's celebrated opinion in *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (C.A. 1), certiorari denied, 348 U.S. 883. That principle, we submit, is correct as a matter of law and eminently sound and practical. In the years since the *Thayer* decision the contours of the principle have become relatively well

[12] 77 strikers were covered in the remand order; 3 of these died during the course of the Board proceedings; and 17 were found by the Board to have engaged in disqualifying misconduct.

defined. Its validity has not been questioned in any circuit.[13] Accordingly, there is even less reason for the Court to review the *Thayer* principle at this time than there was when *Thayer* itself was decided, and this Court denied certiorari.

When an unfair labor practice is found, the Board is required to enter a remedial order that "will effectuate the policies of" the Act (§ 10(c)). To this end the Board is expressly authorized in the same section to order "reinstatement of employees". *Thayer* held that the Board may order the reinstatement of employees even though they were not discharged for engaging in an activity affirmatively protected by section 7 of the Act, if such an order is necessary to remedy an unfair labor practice found by the Board to have been committed by the employer, and if the discharge of the employees was not for cause. The result is that even though some employees may have engaged in misconduct and thereby forfeited the affirmative protections of section 7, the Board may, in appropriate circumstances, order their reinstatement as part of the remedy for the employer's unfair labor practice.

Such a provision is often necessary for the remedy to be adequate. If the employer's unfair labor prac-

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[13] *Thayer* has been followed in *National Labor Relations Board* v. *Puerto Rico Rayon Mills*, 293 F. 2d 941, 947 (C.A. 1), and *Kohler Co.* v. *National Labor Relations Board*, 300 F. 2d 699, 703–704 (C.A.D.C.). See also, *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 484 (C.A. 3); *National Labor Relations Board* v. *Wichita Television Corp.*, 277 F. 2d 579, 585 (C.A. 10), certiorari denied, 364 U.S. 871. The decisions relied on by petitioner to demonstrate a conflict among the Circuits are clearly distinguishable. See nn. 14–15, pp. 23–24, *infra*.

tice was so aggravated as to provoke the employees' misconduct which led to their discharge, reinstatement may be required to restore the *status quo ante* the unfair labor practice. It may also be the only remedy that can prevent the employer from severely debilitating the union and thereby enjoying the very fruits of his illegal conduct. A striking example is provided by the present case, in which, if the discharges are upheld, the local union involved will lose every one of the thirteen strike leaders, constituting the bulk of the union's leadership. Nor would an order reinstating such employees have the effect of condoning misconduct. Numerous sanctions, including union unfair labor practice proceedings by the Board, may be available with respect to the employees' misconduct.

Nothing in the Act prevents the Board from exercising its broad and flexible remedial powers in this fashion.[14] It is true that the Board may not order

[14] To be sure, the Board's discretion in ordering reinstatement of employees who have engaged in misconduct is not absolute. If the employee misconduct is much graver than the employer misconduct, such an order is improper. See *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (sit-down strike); *National Labor Relations Board* v. *Longview Furniture Co.*, 206 F. 2d 274 (C.A. 4) (criminal assault). The Board plainly did not abuse its discretion in concluding in the present case (see Supp. J.A. 2355–2366) that Kohler's blatant, long-continued, and highly provocative misconduct far outweighed in gravity its employees' misconduct (mass picketing, demonstrations, bumping, shoving and shouldering, etc. (see pp. 12, 20, *supra*)), and that application of the *Thayer* principle was necessary to provide a complete remedy for Kohler's unfair labor practices; the Board denied reinstatement to those employees who had made either violent physical

reinstatement of employees discharged "for cause" (§ 10(c)). But it is a question of fact in every case whether the discharge of employees who engaged in some misconduct by an employer guilty of an unfair labor practice was "for cause". If the employer's illegal conduct set in motion the train of events leading to the employees' discharge for misconduct—as the Board found in the present case—then the basic cause of the discharge is not the employees' but the employer's wrongdoing. Such a discharge is surely not "for cause" within the statutory intent. "What is *cause* in one situation may not be in another." *National Labor Relations Board* v. *Thayer Co., supra,* at 753, n. 6 (emphasis in original).[15]

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assaults on, or threatened the families of, nonstrikers. In any event, the question whether the *Thayer* principle—assuming it is valid—was correctly applied to the particular facts of this case is not of such general importance as to warrant review by this Court.

[15] The decisions relied on by petitioner to show the contrary are inapposite. They involved either no employer unfair labor practice at all, in which event the Board would have no jurisdiction to issue a reinstatement order, or no employer unfair labor practice that could be said to have provoked the employee misconduct. *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 237 F. 2d 545 (C.A.D.C.); *National Labor Relations Board* v. *Blades Mfg. Corp.*, 344 F. 2d 998 (C.A. 8); *National Labor Relations Board* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457 (C.A. 2); *W. T. Rawleigh Co.* v. *National Labor Relations Board*, 190 F. 2d 832 (C.A. 7). In *National Labor Relations Board* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (C.A. 3), also cited by petitioner, no contention was made by the Board or the union that reinstatement was required or supported by the *Thayer* principle. The only contention was that the employer had condoned the employees' misconduct, a contention wholly unrelated to the *Thayer* principle.

2. Petitioner also contends that the court of appeals exceeded its reviewing function in remanding the case to the Board for reconsideration of the question whether the strike had been an unfair labor practice strike from its inception. In its initial decision, the Board, in concluding that there had been no generalized refusal to bargain prior to the strike in April 1954, and that consequently the strike had not been caused by unfair labor practices, had given little weight to the Company's pre-1953 attempts to prevent an independent union from gaining a foothold. The Board's reasoning was that the Company's action in signing a contract with the Union in 1953 neutralized the past history (J.A. 11–20, 29–30). The court of appeals held that the Board had erred in discounting the pre-1953 history merely because of the 1953 contract with the Union. It noted that the Company subsequently committed three unfair labor practices designed to frustrate the operation of the grievance procedure established by the contract, conduct which, when viewed against the background of the Company's long-continued and adamant opposition to the union, cast the gravest doubt on the Company's good faith in the negotiations preceding the strike (Supp. J.A. 2327–2330). The court accordingly remanded the case to the Board for reconsideration of this question. The Board accepted the remand, reexamined the record in the light of the court of appeals' opinion, and concluded that the Company had in fact refused to bargain in good faith prior to the strike and that this unfair labor practice had been a cause of the strike (Supp. J.A. 2342–2354).

It is the duty of a reviewing court to determine whether the findings of the Board are supported by substantial evidence on the record considered as a whole, and if they are not, to set aside the Board's order. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. The record in the present case (see pp. 3–16, *supra*) clearly justified the court of appeals in setting aside the Board's original order on the ground that the Board had given undue weight to the Company's action in signing the 1953 contract. At all events the question whether the court correctly applied the *Universal Camera* principle to the facts of this case does not have sufficient general importance to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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